Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 6, Original (2)

In the Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION

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December 17, 1986

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STATE OF NEBRASKA,
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Defendant.

WYOMING BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION

JURISDICTION

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the Court's October 8, 1945, Decree in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 (1945), as modified by the Court's June 15, 1953, Order, *Nebraska v. Wyoming*, 345 U.S. 981 (1953). That Decree apportioning the waters of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes was entered under Article III, Section 2, Clause 2 of the United States Constitution, and the Judiciary Act, 28 U.S.C. § 1251(a) (1980). The Petition that Nebraska seeks leave to file is for enforcement of the Decree. Wyoming contends that the allegations of the Petition, even if assumed to be true, do not establish any violation of the terms of the Decree and do not otherwise present a case or controversy appropriate for the Court's original jurisdiction.

QUESTION PRESENTED

Whether Nebraska's Petition alleges facts which, if true, would establish any violation of the North Platte Decree, and whether the Petition otherwise presents a case or controversy that is appropriate for the exercise of this Court's original jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

Judiciary Act,
28 U.S.C. § 1251(a) (1980):

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

STATEMENT OF THE CASE

A. *1945 North Platte Decree, as Modified*

The litigation resulting in the Court's Decree apportioning the waters of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes was initiated in 1934. The United States was a party intervenor. The Court's opinion addressing the Special Master's recommended decree and the exceptions of the parties to it is reported at *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Decree, entered on October 8, 1945, is reported at 325 U.S. 665. A copy of the 1945 Decree is reproduced in the Appendix at pp. A-1 to A-9. Pursuant to stipulation among the parties, the Decree was modified by the Court's June 15, 1953, Order Modifying and Supplementing Decree, reported at 345 U.S. 981. A copy of the 1953 Order is reproduced in the Appendix at pp. A-10 to A-16. (References hereafter to the "Decree" or the "North Platte Decree" refer to the Decree as modified unless indicated otherwise.) The modifications principally provided for the Bureau of Reclamation's construction and operation of Glendo Reservoir on the North Platte River mainstem in Wyoming and allocation of its yield between Wyoming and Nebraska users under contracts with the Bureau of Reclamation.[1] *Decree*, Par. XVII.

The Decree places certain restrictions on diversions and storage of water from the North Platte River and its tributaries in each of the three states. *Decree*, Par. I, II, V. The Decree confirms the relative Wyoming priorities *inter sese* of the storage rights of the federal storage projects on the North Platte mainstem in Wyoming.[2] *Decree*, Par. III. It also fixes the priorities of those storage rights and the direct flow rights of the Kendrick Project in relation to the priorities of the five Nebraska canals diverting at or above Tri-State Dam for irrigation of Nebraska lands. *Decree*,

[1] Nebraska is allocated up to 25,000 acre-feet annually from Glendo Reservoir; Wyoming is allocated up to 15,000 acre-feet. *Decree*, Par. XVII.

[2] Pathfinder and Guernsey Reservoirs were constructed by the Bureau of Reclamation as part ofthe North Platte Project; Seminoe and Alcova Reservoirs were constructed by the Bureau of Reclamation as part of the Kendrick Project. *Nebraska v. Wyoming*, 325 U.S. at 594-95, 597. Glendo Reservoir was constructed by the Bureau of Reclamation as a unit of the Missouri Basin Project authorized by the Flood Control Act of 1944, 58 Stat. 778. The Bureau of Reclamation operates all five reservoirs.

Par. IV. The Decree limits irrigated acreage and storage for irrigation purposes in parts of the North Platte basin in Wyoming. *Decree*. Par. II. III. The Decree does not otherwise restrict diversions or storage in Wyoming for non-irrigation purposes and does not restrict diversions or storage for any purpose from tributaries of the North Platte below Pathfinder Dam. The Decree apportions only natural flow, not storage water. *Decree*. Par. VI.

The apportionment to Nebraska under the Decree is limited to irrigation water for Nebraska lands supplied by specified irrigation canals diverting from the North Platte mainstem at or above Tri-State Dam. *Decree*. Par. V; *Nebraska v. Wyoming*, 325 U.S. at 625, 654-55. During the May 1 through September 30 irrigation season specified in the Decree, natural flows in the North Platte mainstem between Guernsey Dam and the Tri-State Diversion Dam, including the contribution of Spring Creek, are apportioned 75% to such Nebraska canals and 25% to Wyoming canals. *Decree*. Par. V.

Paragraph X of the Decree provides that the Decree "shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption." Paragraph XII(d) provides that the Decree shall not affect "[t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River."

Paragraph XIII of the Decree provides for the retained jurisdiction of the Court to consider requests by the parties for modification of the Decree, for a supplementary decree, or for further relief.

Nebraska's Petition here asserts that Wyoming has

violated and threatens to violate the Decree, and requests injunctive relief enforcing the Decree. Petition, par. 5, 7, and prayer for relief. Nebraska's Petition does not request modification of the Decree or a supplementary decree.

B. *Additional Pertinent Facts*

The Petition that Nebraska seeks leave to file asserts that the following alleged actions by Wyoming "violate the provisions of the decree":

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers;
>
> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and
>
> d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

Petition, par. 3, 5. The following is a summary of relevant facts relating to each of these allegations in the order in

which they appear in the Petition:

Grayrocks Reservoir

Grayrocks Reservoir was completed on the Laramie River mainstem northeast of Wheatland, Wyoming in 1980. It is used to supply the Laramie River Station, a large coal-fired steam electric power generating plant that was constructed at the same time. The reservoir and power plant were constructed by the Missouri Basin Power Project, a consortium of consumer-owned electric systems supplying power in eight states, including Nebraska and Wyoming. Basin Electric Power Cooperative ("Basin Electric") is the operator of the power plant and reservoir. The Rural Electrification Administration granted loan guarantees for part of the cost of the project in 1976. The U.S. Army Corps of Engineers issued a Section 404 dredge and fill permit for Grayrock Reservoir in 1978. Nebraska and several environmental groups filed lawsuits in the United States District Court in Nebraska challenging both federal actions. They requested an injunction against construction of the reservoir and power plant on grounds of noncompliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (1980), and the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* (1980). The cases were consolidated and decided as *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978). Nebraska had previously formally objected to issuance of a dredge and fill permit for the reservoir on the ground that the depletions to the Laramie River by the project would violate the North Platte Decree. *See* letter of May 12, 1976, from Nebraska Attorney General, Paul L. Douglas, to Colonel Russell Glenn, District Engineer, U.S. Army Corps of Engineers, App. A-17. The U.S. District Court enterered the requested injunction. *Nebraska v. Rural Electrification Administration, supra.*

While the case was pending on appeal to the Eighth Circuit Court of Appeals, all parties to the litigation entered an Agreement of Settlement and Compromise dated December 4, 1978, in which Nebraska withdrew "all objections" to issuance of the permit. The agreement also provided for certain limitations on the operation of Grayrocks Reservoir and for limitations on total water depletions by the Laramie River Station. App. A-24 to A-28. Pursuant to the settlement agreement, the parties executed and filed with the Court of Appeals a stipulation dated February 20, 1979, which resulted in an order vacating the District Court's judgment and dismissing the case with prejudice, subject to the right of any party to "petition the District Court for intrepretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978." App. A-33, A-34. Wyoming was not a party to the litigation or to the settlement agreement or stipulation.

Corn Creek Project

Nebraska's allegation regarding "the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and North Platte Rivers" (Petiton, par. 3b.) apparently refers to the Corn Creek Project, because it is the only project currently proposed for construction in that area. The Corn Creek Project is a proposed project for irrigation of lands currently used for dryland farming and grazing in Goshen County, Wyoming. It was originally studied by the Bureau of Reclamation in 1964. The current sponsor of the project is the Corn Creek Irrigation District, which was formed in 1978 under Wyoming law [Wyo. Stat. §§ 41-7-201, *et seq.* (1977)]. The primary water supply for the project would be storage water supplied from Glendo Reservoir on the North Platte and from Grayrocks Reservoir on the Laramie to the District's pumping facilities at the mouth of the Laramie.

The Grayrock's Reservoir storage water would be delivered pursuant to an existing agreement between the District's predecessor, Corn Creek Reservoir Association, and Basin Electric. That agreement is expressly recognized in the Agreement of Settlement and Compromise between Basin Electric, *et al.*, and Nebraska, *et al.* App. A-27, A-28. The Glendo Reservoir water would be supplied under a pending contract between the District and Bureau of Reclamation. Such water would be part of Wyoming's annual allocation from Glendo Reservoir pursuant to the 1953 modification of the North Platte Decree. *Decree*, Par. XVII(b).

The Corn Creek Irrigation District was formed by order of the District Court, Eighth Judicial District, Goshen County, Wyoming, entered January 20, 1978. *In Re the Corn Creek Irrig. Dist.*, Civil Action No. 19-460 (Wyo. Dist. Ct. 1978), App. A-42. The State of Nebraska filed an Objection to Petition for Formation of Irrigation District, asserting that:

> [Nebraska] may be affected by the formation of the Corn Creek Irrigation District since the waters proposed to be appropriated and used by the district are waters which normally flow from the Laramie River into the North Platte River and are eventually used by Nebraska citizens for agricultural, industrial and domestic purposes. These Laramie River flows, by contributing to the total flow of the North Platte River in Nebraska, are also necessary to maintain the quality of the environment in the North Platte and Platte River Basins in Nebraska.

App. A-37. After a two-day hearing on the petition, in which Nebraska participated by counsel, the district court entered its judgment and decree on January 20, 1978, establishing the District and determining:

> 3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

App. A-44. No appeal was taken from the district court's judgment.

Deer Creek Project

Nebraska's allegation regarding the "proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir" fails to identify any particular storage project. Petition, par. 3c. Wyoming assumes that Nebraska means to refer to Deer Creek Reservoir, which is the only project currently proposed and funded for construction on such tributaries. Deer Creek Reservoir is a municipal storage project proposed to be constructed on Deer Creek, a tributary entering the North Platte River east of Casper, Wyoming, between Pathfinder and Guernsey Reservoirs. The sponsor of the project is the Wyoming Water Development Commission, an agency of the State of Wyoming.

Deer Creek Reservoir would, by exchange, provide a needed supplemental source of water for the City of Casper, whose current service area population is about 57,000, and

for smaller communities along the North Platte below Alcova Reservoir. Wyoming has appropriated a total of $48.25 million for the Deer Creek Project. Wyo. Sess. Laws, ch. 60 (1982), ch. 52 (1984), ch. 89 (1985). Approximately $2.1 million has been expended for studies, plans and specifications, final design, and right-of-way acquisition.

The design capacity of Deer Creek Reservoir is approximately 66,000 acre-feet. Its estimated annual yield is approximately 6,400 to 9,600 acre-feet.[3] The annual yield is highly dependent on carryover storage because of the variability of runoff in Deer Creek from year to year.

On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Army Corps of Engineers for a dredge and fill permit for Deer Creek Reservoir under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1980). A Draft Environmental Impact Statement (published September, 1986) for the Deer Creek Project has been prepared by the Corps of Engineers, Omaha District, and is currently in the public interest review process. Public hearings have been held in both Wyoming and Nebraska. Officials of the State of Nebraska have participated in the hearings.

Inland Lakes

Nebraska alleges that there have been "[a]ctions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska." Petition, par. 3(d), at 2. The only "action" Wyoming has taken with respect to the Inland

[3] The difference in yield estimates is due in part to the uncertainty regarding the priority and extent of the natural flow water rights used to supply the Inland Lakes.

Lakes matter is the lawsuit it filed on October 3, 1986, against the United States in the District Court for the Eighth Judicial District, Goshen County, Wyoming. *Wyoming ex rel. Christopulos v. United States*, Civil Action No. 23-13 (complaint filed October 3, 1986), App. A-46. That lawsuit, brought at the request of the Wyoming State Engineer, asks the court to declare that the Bureau of Reclamation may not divert natural flow water from the North Platte River in Wyoming to storage in four reservoirs in Nebraska known as the Inland Lakes without the requisite Wyoming permits, nor store water out of priority in the Bureau's other reservoirs in Wyoming for the benefit of the Inland Lakes "until the defendants have complied with the laws of the State of Wyoming." App. A-51, A-52. An order dated October 24, 1986, removed the case to the U.S. District Court for the District of Wyoming (Docket No. C 860370). The federal defendants have obtained an extension of time until January 31, 1987, to respond.

Under Wyoming law, an appropriation of water may not be made except pursuant to a valid permit. Wyo. Stat. §§ 41-3-301 (1986 Supp.); 41-3-305 (1977); 41-4-501 (1977); *Lewis v. State Board of Control*, 699 P.2d 822 (Wyo. 1985); *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P. 764, 768-70 (1925). State water officials responsible for administering water rights according to state law, therefore, may not recognize or administer any right to divert waters in Wyoming except pursuant to a valid permit. Wyo. Stat. §§ 41-3-301 (1986 Supp.), 41-3-302 (1977); 41-4-503, 504, 603, 604 (1977). The Bureau of Reclamation has refused Wyoming's requests that it apply for the requisite permits.[4]

[4] The dispute is primarily about whether the Bureau may divert natural flow water through the Interstate Canal for storage in the Inland Lakes without the permits required by Wyoming law. There is no dispute about the Bureau's ability to restore North Platte Project storage water in the Inland Lakes, assuming such restorage is properly accounted for under Wyoming law.

SUMMARY OF ARGUMENT

The matters raised in the Petition which Nebraska seeks leave to file do not involve considerations of high equity sufficient to justify exercise of this Court's sparingly used original jurisdiction. Nebraska invokes the Court's retained jurisdiction to enforce rights it claims under the North Platte Decree. Nebraska's vague allegations do not assert any hard facts concerning violation of the Decree or threat of injury to Nebraska water rights protected by the Decree. Even assuming each of Nebraska's allegations to be true for the purposes of this Brief, they clearly would not establish any violation or threatened violation of the Decree by Wyoming.

Nebraska has no right to the Laramie River. The Laramie River was completely apportioned between Colorado and Wyoming in 1922. The North Platte Decree expressly did not affect that apportionment. This Court's original jurisdiction should not be exercised to allow Nebraska to attempt to upset the long-settled rights and expectations of Wyoming and Colorado under the Laramie River apportionment. Moreover, Nebraska is estopped to invoke this Court's equity jurisdiction for the purpose of asserting that either the Corn Creek Project or Grayrocks Reservoir on the Laramie violates Nebraska's rights under the North Platte Decree. Nebraska litigated in a Wyoming court that very issue regarding the Corn Creek Project and is a party to the very agreement allowing construction and operation of Grayrocks Reservoir.

The North Platte Decree does not restrict water uses on tributaries of the North Platte between Pathfinder and Guernsey Reservoirs. Paragraph X of the Decree affirmatively exempts ordinary and usual municipal uses from the Decree's restrictions. Therefore, construction of Deer Creek Reservoir clearly would not violate the Decree. Such

municipal uses were not intended to be subject to the Court's retained jurisdiction under Paragraph XIII of the Decree. To construe the Decree otherwise would disregard the compelling need for certainty and finality regarding Wyoming's right under the Decree to use water for municipal purposes.

Wyoming's suit to require the Bureau of Reclamation to comply with Wyoming law regarding storage of water in the Inland Lakes is not a violation of the North Platte Decree. The policy of federal deference to state water laws surely encompasses Wyoming's right to have its dispute with the Bureau adjudicated to eliminate the uncertainty caused by the Bureau's refusal to comply with Wyoming law. Wyoming's dispute is with the Bureau regarding questions of Wyoming law, not with Nebraska. The pending litigation initiated by Wyoming provides an adequate forum for determination of such issues. Even if the outcome of that litigation might affect rights asserted by Nebraska under the North Platte Decree, in the interests of comity and judicial economy, this Court should not exercise its original jurisdiction pending the outcome.

Finally, it may be that despite the characterization of its Petition as one for enforcement of the Decree, Nebraska really seeks to modify the Decree to secure greater rights. If so, its allegations do not even suggest sufficient threat of serious injury to justify exercise of this Court's original jurisdiction. Nebraska does not describe any changed conditions that would justify exercise of the Court's original jurisdiction to consider further restrictions on Wyoming, and does not even identify the rights it asserts may be injured. To the extent that Nebraska asserts injury to rights supplied from the North Platte River below Tri-State Diversion Dam, this Court previously determined in *Nebraska v. Wyoming* that local water supplies for such uses were adequate without demand for water in Wyoming, even

during the 1931-1940 extreme drought. Nebraska's allegations are not sufficient to justify exercise of this Court's extradorinary original jursidiction either for the purpose of "enforcing" the existing Decree or modifying it to impose further restrictions.

ARGUMENT

I. WYOMING HAS NOT VIOLATED, AND DOES NOT THREATEN TO VIOLATE, THE NORTH PLATTE DECREE IN ANY RESPECT.

Nebraska has not alleged facts which, if true, would establish any violation or threatened violation of the existing provisions of the North Platte Decree.

A. *The Existing Grayrocks Reservoir and the Proposed Corn Creek Project on the Laramie River Do Not Violate or Threaten to Violate the North Platte Decree.*

1. *Nebraska has no right to water from the Laramie River.*

Implicit in Nebraska's allegations regarding Grayrocks Reservoir and the proposed Corn Creek Project is the assertion that the North Platte Decree entitles Nebraska to demand water from the Laramie River, despite this Court's prior apportionment of the Laramie River between Wyoming and Colorado. *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957). The 1922 Laramie River Decree was subsequently construed by the Court as confirming "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries . . ." *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936).

In the North Platte litigation Nebraska argued that, not having been a party to the Laramie River proceedings, Nebraska was not bound by the Laramie River Decree, and was entitled to share in any waters in the Laramie River drainage in excess of the requirements of Wyoming and Colorado as determined by the Court in the Laramie River proceedings. (*E.g.*, Nebraska Replication to Colorado Answer and Cross Bill at 8, *Nebraska v. Wyoming*, 325 U.S. 589 (1945); Nebraska Opening Brief before Special Master at 43, *id.*)

Colorado and Wyoming took the position throughout the North Platte proceedings that all of the waters of the Laramie River had been "fully and completely divided and apportioned" between the two states by the Laramie River Decree, that the Decree was *res judicata*, and that the apportionment should not be disturbed in the North Platte apportionment proceedings. (*E.g.*, Colorado Answer and Cross Bill at 32, 48, *id.*; Wyoming Answer to Colorado Cross Bill at 9, *id.*) The Special Master agreed:

> The water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, 259 U.S. 419, and that of the South Platte River was equitably distributed by compact between Nebraska and Colorado ratified by the Congress in 1926. This conclusion takes into the account the interests of all parties and no redistribution of the waters of those rivers should be undertaken in this suit.

Special Master's Report at 8, *id.*

None of the parties excepted to that conclusion of the Special Master. Nor did they ask the Court to impose any restrictions on future depletions of the Laramie River by Wyoming appropriators. Noting that Colorado's Answer

and Cross Bill requested an equitable apportionment among the three states, "excepting only the tributary waters of the South Platte and Laramie rivers", the Court confirmed the Special Master's conclusion:

> The waters of the South Platte and the Laramie were previously apportioned — the former between Colorado and Nebraska by compact, the latter between Colorado and Wyoming by decree. Those apportionments are in no way affected by the decree in this case.

Nebraska v. Wyoming, 325 U.S. at 592, n.1 (citations omitted). The Court's description of the drainage area of the North Platte expressly excludes the Laramie River. *Id.*, n.2. The North Platte Decree entered by the Court in 1945 provides that the Decree shall not affect "the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." *Decree*, Par. XII(d).

In 1957, the Laramie River Decree was amended, *inter alia*, to permit increased diversions in Colorado, and to provide: "The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado." *Wyoming v. Colorado*, 353 U.S. at 953 (1957).

Nebraska therefore has no equitable claim to the Laramie River and cannot in good faith argue that existing or future depletions to the Laramie River violate its rights under the North Platte Decree. This Court's original jurisdiction should not be used to allow Nebraska to attempt to upset Wyoming and Colorado's long-settled rights and expectations with respect to the Laramie River through vague allegations about the "equitable balance" of

the North Platte. Principles of equity and finality respecting water rights recognized by this Court in original jurisdiction proceedings preclude Nebraska from attempting to relitigate the Laramie River issue here. *Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983).

2. *Even if Nebraska had some right to the Laramie River, it is estopped to assert that Grayrocks Reservoir or the Corn Creek Project infringe on its rights.*

To the extent that Nebraska's claims here are based on equitable principles, it simply is not in a position to complain about either Grayrocks Reservoir or the proposed Corn Creek Project. Nebraska is a party to the very settlement agreement and stipulation that allowed construction of Grayrocks Reservoir and the Laramie River Station. They were completed and have been in operation for six years. Nebraska is estopped to now claim that construction or operation of Grayrocks Reservoir consistent with the settlement agreement violates its rights. *See generally Dickerson v. Colgrove*, 100 U.S. 578 (1879), and *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959).

Under the settlement agreement and stipulation, the owner of the reservoir is obligated to operate it within the specific limitations agreed to by Nebraska. If the owner of the reservoir fails to operate it in compliance with the agreement, Nebraska's remedy is against the owner of the reservoir, not Wyoming. The stipulation specifically provided for enforcement of the terms of the settlement agreement by the U.S. District Court in Nebraska. Wyoming is not a party to the stipulation or agreement. Any dispute about compliance with the agreement does not involve Wyoming and does not belong in this Court.

Nebraska is in no better position to complain about the proposed Corn Creek Project. The operational limitations established in the Grayrocks settlement agreement specifically took into account the depletions to the Laramie River that would result from the Corn Creek Project. App. A-26 to A-28.

In addition, Nebraska was a party to the proceedings in the Wyoming court for the formation of the Corn Creek Irrigation District for the purpose of constructing and operating the Corn Creek Project. Nebraska placed in issue there the very claim it raises here — that the depletions by the Project would violate Nebraska's rights under the North Platte Decree. App. A-39. Nebraska agrued that because it had a prior right to Laramie River waters, there would be insufficient water available for the Corn Creek Project. Nebraska had a full and fair opportunity to litigate that issue. The court squarely held that Nebraska had no legitimate claim to Laramie River water under the North Platte Decree. App. A-44. Nebraska did not appeal from the court's judgment and therefore is bound by it. *Illinois v. Michigan*, 409 U.S. 36, 37 (1972).

Nebraska freely chose to present that issue to the state court in Wyoming and freely chose not to appeal the ruling against it. As this Court said of the United States' attempt to relitigate a matter previously determined in a state court, "[c]onsiderations of comity as well as respose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." *Montana v. United States*, 440 U.S. 147, 163 (1979). *See generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Under these circumstances, even assuming Nebraska had an equitable claim to the Laramie River, Nebraska cannot invoke this Court's equitable original jurisdiction to attempt to relitigate issues relating to Grayrocks Reservoir and the Corn Creek Project.

B. *Construction and Operation of Deer Creek Reservoir Will Not Violate the North Platte Decree, and Its Proposed Construction Is Not within the Scope of the Court's Retained Jurisdiction.*

1. *Wyoming has a right under the Decree to construct the Deer Creek Project.*

The Decree does not restrict diversions or storage for any purpose on tributaries between Pathfinder and Guernsey Reservoirs, including Deer Creek. In addition, Paragraph X of the Decree affirmatively exempts ordinary and usual domestic and municipal uses from any restrictions under the Decree. Therefore, under the Decree, Wyoming has an absolute right to construct Deer Creek Reservoir.

By characterizing the Deer Creek Project as a threatened violation of the existing Decree and invoking the Court's retained jurisdiction to reconsider the question of new storage on tributaries between Pathfinder and Guernsey Reservoirs, Nebraska evidently hopes that a less stringent standard for exercise of the Court's original jurisdiction will apply. Wyoming believes that except for legitimate claims of violation of the existing Decree, the standard should be no less stringent than where a new apportionment is requested.

The projected depletions by the Deer Creek Project are relatively small by any standards, but particularly in comparison to the massive existing storage projects on the North Platte in both Wyoming and Nebraska.[5] The yield and projected depletions by the Deer Creek Project are

[5] The combined total storage capacity of the Bureau of Reclamation's North Platte and Kendrick Project reservoirs and Glendo Reservoir in Wyoming is about 3.1 million acre-feet. The combined storage capacity of Sutherland Reservoir and Lake McConaughy (Kingsley Dam) in Nebraska is about 2.1 million acre-feet.

small for the same reasons that the Special Master concluded regulation of the tributaries to be unjustified, even during the 1931-1940 extreme drought period upon which the Decree was based:

> On the tributary streams the runoffs are of shorter duration even than those above Pathfinder. The flows reach their peak in May, fall off rapidly during June, and usually run dry by the first of July, before there is serious shortage of water in the river. There are hundreds of small diversions on these tributaries, regulation of which could be of little, if any, benefit to the river below. [Footnotes ommitted].

Special Master's Report at 52. *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Nebraska has not alleged any change in conditions that would justify the imposition of restrictions on the tributaries now.

2. *Municipal uses such as the Deer Creek Project are not subject to the Court's retained jurisdiction.*

The Court's retained jurisdiction under Paragraph XIII was not intended to apply to municipal uses such as the Deer Creek Project. The restrictions in the Decree apply only to irrigation uses. The Decree recommended by the Special Master and approved by the Court permitted expansion of irrigation uses in some areas and restricted them to then-existing levels in other areas:

> [Equity] does require, during present or comparable conditions of water supply, restraint of any further expansion of irrigation from the river or its tributaries between the Colorado-Wyoming state line and Pathfinder Reservoir or from the

> main river in the section between Pathfinder Reservoir and Guernsey.

Special Master's Report at 9-10, *id.*

The Decree imposes no restrictions on future expansions of municipal uses. The parties agreed that "there should be no restriction upon the diversion from the North Platte River in Colorado or Wyoming of water for ordinary and usual domestic and municipal purposes and consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses." *Nebraska v. Wyoming*, 325 U.S. at 656. The Court adopted that provision and extended it to the tributaries at Wyoming's suggestion. *Id.*

Paragraph X affirmatively provides that the Decree "shall not affect or restrict" ordinary and usual domestic and municipal uses. The word "restrict" means "to restrain within bounds; to limit; to confine." Black's Law Dictionary (5th Ed. 1979). The express affirmative exemption of municipal uses by a separate article of the Decree reflects intent that future expansion of such uses not be limited and that such uses be treated differently than irrigation uses for purposes of the Court's retained jurisdiction. Otherwise, Paragraph X would be superfluous.

The Decree, in effect, apportioned to each of the three states the right to use water from the North Platte and its tributaries for future ordinary and usual domestic and municipal uses without restriction. This treatment of municipal uses is consistent with both common sense and principles of certainty and finality. Although subject to administration in the priority system like other water rights, domestic and municipal uses are generally recognized to be preferred uses, as they are by Nebraska, Wyoming and Colorado. Neb. Rev. Stat. §§ 46-204, 46-613

(Reissued 1984); Wyo. Stat. § 41-3-102 (1977); Colo. Const. art. XVI, § 6. *See also Connecticut v. Massachusetts*, 282 U.S. 600, 673 (1981).[6] Cities grow, and must be able to provide water for such growth. Presumably cities in Nebraska using water from the North Platte too have experienced growth since 1945. Because of the brief and highly variable runoff on the tributaries recognized by the Special Master, and because existing senior rights have appropriated the dependable supply on the mainstem, reliable municipal water supplies cannot be provided in this area of Wyoming without storage.

In order to plan and develop water supplies for future needs, cities must have certainty regarding their legal right to use water. The compelling need for certainty requires finality regarding determinations of such rights. Here, that means that the apportionment to each of the states of water for municipal use effected by Paragraph X of the Decree should not be subject to the Court's retained jurisdiction under Paragraph XIII. *See Arizona v. California*, 460 U.S. 605, 619-20 (1983), construing a similar retained jurisdiction provision narrowly in the interests of certainty and finality respecting water rights.

Even assuming that Paragraph X was not intended to have any separate effect, Deer Creek Reservoir will not violate the existing Decree. Nor has Nebraska alleged facts or changed conditions which would justify the Court's

[6] There, Connecticut asserted that any further reduction in the flow of the Connecticut River would injure its vested rights. The Boston area faced a serious water shortage. Denying the injunction sought by Connecticut, the Court said:

> [T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. . . Drinking and domestic purposes are the highest uses of water. An ample supply of wholesome water is essential.

282 U.S. at 669, 673.

exercise of its retained jurisdiction to consider the imposition of new restrictions on the tributaries.

C. *Wyoming's Suit to Require the United States Bureau of Reclamation to Obtain Wyoming Permits for Storage in the Inland Lakes Does Not Violate the North Platte Decree and Is Not a Controversy Appropriate for this Court's Original Jurisdiction.*

1. *Wyoming's suit against the Bureau of Reclamation is not a violation of the North Platte Decree.*

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383 (1980), requires the Bureau of Reclamation to proceed in conformity with state water laws in constructing and operating its projects. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 612-15, 629 (1945); *California v. United States*, 438 U.S. 645 (1978). Nevertheless, the Bureau has refused to apply for the permits required by Wyoming law for diversion of natural flow water from the North Platte River through the Interstate Canal for storage in the Inland Lakes. Without such permits, Wyoming water officials are unable to properly carry out their statutory duties to administer water rights in the North Platte River. Without such permits and the information to be provided in the applications for them, there is great uncertainty regarding the Bureau's operation of its North Platte Project to supply the Inland Lakes and the effect of such operation on other Wyoming water rights. Unresolved questions exist concerning the quantity and timing of natural flow water and storage water delivered to the Inland Lakes, the priority under which natural flow is diverted and stored, and the manner and place of use of the water.

The uncertainty resulting from the Bureau of Reclamation's refusal to comply with Wyoming law is detrimental to

Wyoming and its water users. *Lewis v. State Board of Control*, 699 P.2d 822 (Wyo. 1985); *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P.764 (1925). Wyoming's attempt to have this uncertainty resolved by its suit now pending in the United States District Court is not a violation of the North Platte Decree. The Decree does not purport to exempt the United States from compliance with Wyoming law in the construction and operation of its reclamation projects; on the contrary, the Court mandated such compliance. *Nebraska v. Wyoming*, 295 U.S. at 43, 325 U.S. at 612-15, 629.

2. ***Nebraska's attempt to preempt the litigation between Wyoming and the Bureau of Reclamation does not present a controversy appropriate for this Court's original jurisdiction.***

Wyoming's dispute is with the Bureau of Reclamation, not Nebraska. To the extent that the outcome of the dispute might affect the irrigators in Nebraska who use Inland Lakes water, their interests are represented by the Bureau. The Bureau has an obligation to operate the North Platte Project and to secure its water rights for the benefit of those irrigators. *Nevada v. United States*, 463 U.S. 110, 127-28 (1983).

The Wyoming suit involves primarily issues of state law. Those issues are not appropriate for this Court's original jurisdiction when there is another adequate forum for their determination. *Arkansas v. Texas*, 346 U.S. 368 (1953). If questions of federal law are litigated in the pending proceeding, the parties will have recourse to this Court through the normal appellate process.

In similar circumstances, this Court denied a motion for leave to file a compliant because there was "an appropriate forum in which the *issues* tendered here may be

litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (emphasis in original). The Court found that the pending state court lawsuit provided a more appropriate forum where the real parties in interest could have their dispute fully and fairly determined. The same is true here. The Court's original jurisdiction is exercised sparingly, and need not be exercised where the real parties in interest have an adequate, and perhaps more appropriate, forum for resolution of the issues. *United States v. Nevada*, 412 U.S. 534, 538 (1973).

This principle of restraint in the exercise of the Court's original jurisdiction was recognized recently when the Court denied South Dakota's motion for leave to file a complaint against Nebraska, Iowa and Missouri. *South Dakota v. Nebraska*, 106 S.Ct. 1487 (1986). Nebraska argued there that this Court should not exercise its original jurisdiction because the action which gave rise to South Dakota's complaint was a pending federal district court suit[7] brought by Nebraska, Iowa, Missouri and other private parties against the U.S. Army Corps of Engineers, the U.S. Bureau of Reclamation and various officials within those agencies. Nebraska argued: "If the case [in the lower federal court] simply involves an effort by Nebraska, Iowa and Missouri to force a federal agency to comply with federal law, however, no basis exists for exercise of this Court's original jurisdiction." Brief of Defendants in Opposition to Motion for Leave to File Complaint, *id.*

The same principle applies here. It would be prudent for this Court to await the outcome of the pending litigation before deciding whether exercise of its original jurisdiction is appropriate.[8] *Arkansas v. Texas*, 346 U.S. at 368. The litigation may ultimately resolve Nebraska's concern or more sharply focus the issues.

[7] *Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984).

[8] The United States, as *amicus curiae*, agreed that the Court should

II. NEBRASKA'S ALLEGATIONS DO NOT PRESENT A CASE OR CONTROVERSY APPROPRIATE FOR THIS COURT'S ORIGINAL JURISDICTION.

If the real relief that Nebraska seeks is modification of the decree to impose further restrictions on uses in Wyoming in order to secure greater rights than the existing Decree provides, Nebraska has failed to allege facts which would demonstrate sufficient threat of injury to justify exercise of this Court's original jurisdiction. A request for such relief would be the equivalent of a request for a new apportionment.[9] Accordingly, a showing of an imminent threat of serious injury to Nebraska's rights would be required. *Idaho v. Oregon*, 462 U.S. 1017 (1983); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). Nebraska's allegations fall far short of meeting this standard.

Nebraska has no right to the Laramie River. Nor does Nebraska have any rights assertable against municipal uses in Wyoming such as the proposed Deer Creek Project. Even if it did, the facts it has alleged do not show a threat of injury to any Nebraska rights protected by the North Platte Decree. Nebraska's rights under the apportionment provided by the Decree are limited to the water supplies for lands irrigated by canals diverting at and upstream of Tri-State Dam. *Nebraska v. Wyoming*, 325 U.S. 589, 607, 654 (1945). Nebraska has not alleged that the water supply for such canals is threatened, and has not identified other rights that might be injured. The Court found that local water supplies for uses supplied from sources below Tri-State Dam were adequate, even during the 1931-1940

withhold exercise of its original jurisdiction pending the outcome of the *Missouri v. Andrews* litigation in the lower federal court. Brief for the United States as *Amicus Curiae* at 8, *South Dakota v. Nebraska*, 106 S.Ct. 1487 (1986).

[9] Both Wyoming and Colorado would be required to be parties to such a proceeding, as a matter of equity.

extreme drought period upon which the Decree was based. *Id.* Any assertion of injury to rights below Tri-State Dam cannot properly be made in a proceeding characterized as one to "enforce" the North Platte Decree.

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the Decree by vague references to "changed conditions". Such "changed conditions" are not described. The Decree was based on the 1931-1940 extreme drought period during which Nebraska's suit was litigated. Both the Special Master and the Court acknowledged that if water supply conditions subsequently improved, the restrictions on Wyoming and Colorado might not be justified. That was the principle reason for the Court's retained jurisdiction in Paragraph XIII of the Decree. *Nebraska v. Wyoming*, 325 U.S. at 610, 620; Special Master's Report at 10-11, 39, 119-22, *id.* Regarding the provision in his recommended decree for retention of jurisdiction to consider changed conditions, which was subsequently adopted by the Court, the Special Master explained:

> This recommendation contemplates particularly the possibility of the passing of the present drouth cycle and the future availability of far greater water supplies, comparable with those of former years which might justify a release of some or all of the restrictions now proposed.

Special Master's Report at 10-11, *id.*

Based on water supply conditions in the North Platte River drainage since 1940, it is doubtful that the Court would have found the restrictions on Wyoming and Colorado uses to have been justified. When the Decree was entered, it was questioned whether Seminoe Reservoir ever would fill. *Nebraska v. Wyoming*, 325 U.S. at 609; *Decree*, Par. VIII(a). Seminoe has filled regularly since. In addition,

Glendo Reservoir has been constructed and filled. Nebraska has not alleged any facts to the contrary. Indeed, the only "facts" alleged by Nebraska relate to purported "violations" of the existing Decree. Even assuming those facts to be true, they do not establish a violation of the Decree.

In short, Nebraska's allegations are insufficient to justify the exercise of the Court's original jurisdiction either for the purpose of "enforcing" the existing Decree or modifying it to impose further restrictions.

CONCLUSION

For the foregoing reasons, the Motion for Leave to File Petition should be denied.

Respectfully submitted,

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No. 6. Original

In the Supreme Court

of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

APPENDIX

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NEBRASKA v. WYOMING
(325 U.S. 589)
Decree

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be, and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the

Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that

unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transporation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loses-Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover	8,360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of

70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, it officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases

from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court

retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the state of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief

magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, ORIGINAL. NEBRASKA v. WYOMING (COLORADO, IMPLEADED DEFENDANT, AND THE UNITED SSTATES, INTERVENOR.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment

> of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

> XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.
>
> XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:
>
> (a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.
>
> (b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never

exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of

70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	*Area Acres*	*Daily Loss-Second Feet May*	*June*	*July*	*Aug.*	*Sept.*
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than

submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

State of Nebraska
DEPARTMENT OF JUSTICE

May 12, 1976

Colonel Russell Glenn
District Engineer
U.S. Army Corps of Engineers
Omaha District
6014 United States Post Office
and Court House
Omaha, Nebraska 68102

Attention: Operations Division

Dear Colonel Glenn:

It is my understanding that the Corps of Engineers is presently considering the application of Basin Electric Power Cooperative to construct the Grayrocks Dam and Reservoir on the Laramie River in Wyoming for the purpose of providing water for electric generating plants. I am informed that the proposed dam could take up to 100 percent of the flow of the Laramie River, which is the most significant single contributor to the flow of the North Platte River. The flow of the North Platte River has been apportioned between the States of Nebraska and Wyoming by the United States Supreme Court in the case of *Nebraska v. Wyoming*, 325 U.S. 589 (1945), as modified June 15, 1953.

The Supreme Court decree provides that:

> "That natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek be and the same hereby is apportioned between Wyoming and Nebraska on the basis of

twenty-five per cent to Wyoming and seventy-five per cent to Nebraska. . . ."

It is obvious that the construction of this project would significantly invade and interfere with the water rights of Nebraska citizens.

Basin Electric has not addressed this highly important issue in their application and presentation before your agency. The effects of this project do not stop at the Wyoming-Nebraska state line and, therefore, the detrimental impact on the flows of the Platte River in Nebraska must be given serious consideration.

The Governor of Nebraska and I have discussed this matter and he joins me on behalf of the State of Nebraska in requesting that the Corps of Engineers issue no permit for construction of the proposed dam and reservoir except under conditions which will preserve the natural flows of the North Platte River including the contribution of the Laramie River, during each annual period of May 1 through September 30, or until such time as adequate arrangements are affected which will protect the rights of the State of Nebraska and its citizens under the above decree. We believe that such conditions must ensure the State of Nebraska that the Grayrocks Reservoir will be operated pursuant to the terms of the decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), as modified June 15, 1953, and that no part of the natural flow of the Laramie River will be used by Basin Electric Power Cooperative or stored in Grayrocks Reservoir during the period May 1 through September 30.

Sincerely yours,

(signed)
Paul L. Douglas
Attorney General

PLD:smh

[Exhibit No. 75 in the Case Nos. CV76-L-242 and CV78-L-90, according to conversation with the Clerk of the Federal District Court for Nebraska on December 3, 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al., Appellees, v. BASIN ELECTRIC POWER COOPERATIVE, et al., Appellants.	)	No. 78-1775
STATE OF NEBRASKA, et al., Appellees, v. RURAL ELECTRIFICATION ADMINISTRATION, et al., Appellants.	)	No. 78-1778

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that:

1. The Agreement of Settlement and Compromise ("Agreement") which was fully and finally executed on December 4, 1978, and which is attached to the Memorandum of Law being filed herewith as Appendix A and which is incorporated herein by reference, constitutes a full and final resolution of the disputes which gave rise to the above-captioned consolidated appeals.

2. Paragraph 14 of the Agreement provides that the Agreement shall be null and void unless each of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

3. The conditions subsequent contained in Paragraphs 14(a) and (b) of the Agreement have been satisfied. Attached as Exhibit B to the Memorandum of Law being filed herewith, is a letter of the Secretary of the Interior to Edward Weinberg dated January 5, 1979[1] which reflects the Secretary's concurrence to Section 12 of the Agreement. Attached as Exhibit C to the Memorandum of Law being filed herewith is a copy of the official transcript of the Endangered Species Committee. As pages 12-14 of that transcript reflect, the Endangered Species Committee voted unanimously in favor of the proposition which:

> "...[G]rants an exemption for Grayrocks project with the explicit condition of those mitigation and enhancement provisions set forth in the agreement of settlement and compromise dated December 4, 1978, by and among the litigants in the case of Nebraska et al. versus REA, et al."
> (Tr. at 12).

4. To satisfy the condition subsequent of Paragraph 14(c) of the Agreement, this Court is requested to enter an order which:

(1) provides that the amended judgment of the District Court below which was entered on October 23, 1978 and docketed on October 24, 1978 is vacated;

[1] The letter bears an erroneous date of January 5, 1978. The letter was actually issued on January 5, 1979.

(2) provides that these consolidated appeals are dismissed;

(3) remands the cases to the District Court with instructions to dismiss the cases with prejudice, provided that any party to the limitation may petition the District Court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978 which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

(4) provides that, except as specifically provided in the Agreement, each party is to bear its own costs incurred in this litigation.

A proposed order which all parties agree will carry the Agreement into effect is being filed herewith.

5. The Rural Electrification Administration of the Department of Agriculture is currently preparing a supplemental environmental impact statement on the Missouri Basin Power Project, as required by Paragraph 13 of the Agreement.

6. All plaintiffs and intervening plaintiffs below agree, with respect to the Project which is the subject to the litigation herein, that they will neither bring nor support any new litigation by whomever brought asserting that any new environmental impact statements under the National Environmental Policy Act or actions under the Endangered Species Act of 1973, as amended by the Endangered Species Act Amendments of 1978, or under the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, or under the Fish and Wildlife Coordination Act, are required in connection with the carrying out by the Missouri Basin Power Project of its obligations under the Agreement.

Dated: February 20, 1979.

(Signed)
Attorney for Defendant Basin
Electric Power Cooperative and
all Intervening Defendants

(Signed)
Attorney for Federal Defendants

(Signed)
Attorney for National Wildlife Federation,
Nebraska Wildlife Federation, and
National Audubon Society

(Signed)
Attorney for State of Nebraska

(Signed)
Attorney for Powder River Basin
Resource Council and Laramie River
Conservation Council

AGREEMENT OF SETTLEMENT AND COMPROMISE

THIS AGREEMENT OF SETTLEMENT AND COMPROMISE ("Agreement"), made and entered into this 4th day of December, 1978, by and among Basin Electric Power Cooperative ("Basin"), on its own behalf and as project manager and operating agent for the Missouri Basin Power Project ("Project"); Tri-State Generation and Transmission Association, Inc. ("Tri-State"), on its behalf and as agent for Chimney Rock Public Power District, the Midwest Electric Membership Corporation, Panhandle Rural Electric Membership Association, Northwest Rural Public Power District and Wheat Belt Power District; City of Lincoln, Nebraska; Wyoming Municipal Power Agency ("WMPA"); the State of Nebraska; the National Wildlife Federation, Inc.; Nebraska Wildlife Federation; National Audubon Society; Powder River Basin Resource Council; Laramie River Conservation Council; Anthony C. Liotta, in his official capacity as Deputy Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice; Robert W. Feragen, in his official capacity as Administrator of the Rural Electrification Administration, United States; and James W. Ray, in his official capacity as District Engineer, Omaha District, United States Army Corps of Engineers.

WHEREAS, the parties desire to settle and compromise the dispute that has arisen among them concerning whether the REA Administrator, in issuing loan guarantees for the Project, and the District Engineer, Omaha District, U.S. Army Corps of Engineers, in issuing a dredge and fill permit for the Grayrocks Dam and Reservoir, a feature of the Project, under Section 404 of the Federal Water Pollution Control Act, as amended, acted in compliance with applicable laws and regulations;

NOW THEREFORE, in consideration of the promises

and convenants herein contained, the parties hereto agree as follows:

1. The maximum annual consumptive water use by the power plant at the Laramie River Station will be limited to 23,250 acre-feet per year.

2. To satisfy the requirements cited in Section 1 above, the Project will first utilize the quantity of water which is available to the Project as a result of the Boughton Ditch acquisition. The Project will, secondly, utilize the quantity of water which is available to the Project from the inundated water rights at the reservoir site. The Project will, thirdly, utilize the quantity of water which has been made available to the Project from the Johnson well fields in accordance with the Order of the Wyoming State Engineer dated November 1, 1978 (The Project shall withdraw the "enlargement application" set forth in Paragraph 4 of that Order at page 12). The Project will, fourthly, utilize the water which is stored in the Grayrocks Reservoir. The water rights representing the foregoing are enumerated in Exhibit A appended hereto and incorporated herein by reference. The Project shall not obtain any water or water rights within the Laramie River drainage other than those set out above and enumerated in Exhibit A, or store any water in the Grayrocks Reservoir except pursuant to water rights set out above and enumerated in Exhibit A, or cause the other obligations of this Agreement to be satisfied by water or water rights from within the Laramie River drainage other than by those set out above and enumerated in Exhibit A, except that:

(a) The project may for purposes of start up, initial plant operation and for subsequent intermittent periods of plant operation, utilize groundwater from irrigation wells existing as of the date of this Agreement, or from new wells used in lieu of existing irrigation wells, but only so that such

groundwater use by the Project shall not exceed on an annual basis the amount of water historically consumed by the irrigation appropriation and use from the above mentioned existing wells as determined by the appropriate Wyoming state agency. (This groundwater use shall not increase the limit stated in Section 1); and

(b) This provision shall not preclude acquisition of water or water rights of Corn Creek Irrigation District by the Project to satisfy the other provisions of this Agreement out of water rights or applications for water rights of Corn Creek Irrigation District existing as of the date of this Agreement.

3. All water intake structures will be designed and implemented for the sole purpose of supplying water to the Project for Project purposes. No other intake structures will be allowed and the Project will not authorize other entities to construct intake structures at the reservoir site. All intake structures will be metered. A stream-gauging station will be provided above the reservoir and at a distance sufficiently remote from the reservoir so that reservoir storage will not affect the accuracy of the stream-guaging [sic] apparatus. There will be stream-gauging station located below the dam and reservoir site but above any additional drainage or draw from the river and another stream-guaging [sic] station at the mouth of the Laramie River. There will be metering apparatus in each pumping structure supplying water to the Project, including all underground water wells.

4. (a) The Project agrees to release adequate flows from Grayrocks Reservoir to insure that flows at a minimum, as measured at the first gauging station below the dam, are 40 cfs during April, and 40 cfs or 75% of the natural flow at the same gauging station during the remaining five months of the year (May through September, inclusive),

whichever is greater. The Project agrees to operate the Grayrocks Reservoir so as to provide for the delivery of 40 cfs at the mouth of the Laramie River during six months of the year (October through March, inclusive), 50 cfs during April, and 40 cfs or 75% of the natural flow of the Laramie River at its mouth during the remaining five months of the year (May thorugh [sic] September, inclusive), whichever is greater: provided, that the Project will not be required to release more than 200 cfs at any one time nor more than 12,000 acre-feet during any month.

(b) During the initial reservoir filling period, flows will be maintained at the mouth of the Laramie River of at least 20 cfs from October through March, and at 40 cfs during the six months until 70,000 acre-feet have been placed in storage.

(c) Whenever total reservoir storage drops below 50,000 acre-feet, the flow levels to be maintained by the Project shall be 20 cfs from October through March, and 40 cfs from April through September, as measured at the mouth of the Laramie River.

5. When and if the Corn Creek Irrigation District constructs its diversion and delivery system and the District begins using water from the Laramie River Basin, the Project will deliver into the mouth of the Laramie River on an annual basis an amount of water equal to the minimum flows specified in Section 4 minus 22,500 acre-feet and, in addition, will deliver into the North Platte River on an annual basis 11,250 acre-feet, subject to adjustment as provided below. The Project may meet this obligation (subject to the limitations in Section 2) with any flows from the Laramie River which exceed the number of acre-feet derived by subtracting 22,500 from the minimum flow figures in Section 4. Alternatively, at its option, the Project may acquire a portion of this amount or an equivalent

amount of water from sources in Wyoming and/or the North Platte Basin in Nebraska and deliver it to the North Platte. This obligation shall continue for as long as the Laramie River Station remains in commercial operation.

6. If the water delivered to the North Platte River by the Project is obtained from any source below the confluence of the Laramie River and the North Platte River, the Project shall be credited with the amount deemed to be conveyance loss. Conveyance loss shall be determined by the North Platte Natural Flow Committee referred to in Section 8.

7. The Project will deliver water annually as provided in sections 5 and 6 above, in the same irrigation season that it is withdrawn by the Corn Creek Irrigation District. For purposes of this Agreement, the irrigation season shall be April through September, inclusive. As used in sections 5 and 6, "deliver" includes, without limitation, abandonment to the North Platte, or failure to use, either temporarily or permanently, Laramie River or North Platte River water or water rights, the right to the use of which has been acquired by the Project, either by purchase, contract or otherwise, so that either the flow of the North Platte is augmented or an existing depletion is avoided as the result of such abandonment or failure to use.

8. The Project will annually submit to the Governor of the State of Nebraska, the Attorney General of the State of Nebraska, and the Director of the Department of Water Resources of the State of Nebraska (with copies to the Laramie River Conservation Council, the Powder River Basin Resource Council, and the National Wildlife Federation) a written report containing all the data and information necessary to show that all conditions agreed to in this Agreement have been fully complied with. The annual report will also incude all pertinent data and information

gathered from the metering and gauging apparatus required in section 3 above. The Project will submit this written report, as well as an oral report, if asked to do so, to the North Platte Natural Flow Committee meeting of officials of the State of Nebraska and the State of Wyoming each year. For the purpose of assuring interested parties that the gauging apparatus is accurately recording data and in proper working condition, officials of the Nebraska Department of Water Resources will be allowed to verify the information supplied from the gauging apparatus and to conduct appropriate tests, subject to prior agreement by the project Operating Agent, upon such apparatus to determine that they are in proper working condition. The Project will allow officials of the State of Nebraska to have access to all records kept and the right to request and receive reasonable supplemental data regarding compliance by the Project with the water release and delivery requirements of this Agreement.

9. Each October, Basin will request a meeting with a representative to be designated by the State of Nebraska, at which Basin will review its proposed operating plan for Grayrocks Reservoir for the next calendar year. Basin will give serious consideration to comments and recommendations by the Nebraska representative and modify its operating plan to the extent compatible in its judgment with full and efficient operation of Laramie River Station, its commitments to other parties in respect to reservoir management, and with any recommendations by other interested parties such as the U.S. Fish and Wildlife Service and the State of Wyoming. Similar information and consultation will be provided during the year if, in the judgment of the Operating Agent, significant changes in the operating plans are required.

10. Upon the occurrence of all of the events specified in Section 14, the Project, through Basin, shall establish the

Platte River Whooping Crane Habitat Maintenance Trust by executing a trust declaration in the form appended hereto as Exhibit B, which is incorporated herein by reference.

11. (a) Basin, Tri-State and WMPA agree that the proposed amendment to Wyoming Statute §41-3-104, attached hereto as Exhibit C is consistent with the policies of their respective organizations and for a period of ten (10) years hereafter agree to actively support the proposed amendment before the Wyoming Legislature. They further agree to actively support the specific concept of this proposed amendment if it is contained in or included with other proposed amendments to Wyoming Statute §41-3-104, which they otherwise may not choose to support.

(b) Basin (except as otherwise set forth in this Agreement as to the Project), Tri-State, and WMPA agree that they shall not, without prior written consent of the Laramie River Conservation Council and the Powder River Basin Resource Council, transfer, nor seek to transfer from irrigation use or appropriation to industrial use or appropriation, water or water rights within the Laramie River drainage before the 1st day of December, 1988.

12. The parties agree that compliance by the Project with this Agreement satisfies the requirements of the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978.

13. All objections to the adequacy of the existing EIS and to the 404 Permit as amended and to the REA loan guarantees are withdrawn. A supplemental EIS is under preparation. The non-Federal parties agree not to challenge its adequacy.

14. This Agreement shall be null and void unless each

of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

15. Upon execution of this Agreement, the parties, through their respective counsel, will promptly file in the Eighth Circuit Court of Appeals a stipulation incorporating this Agreement and requesting that the Eighth Circuit Court of Appeals take appropriate action to vacate the judgment of the District Court and to dismiss the pending litigation with prejudice. The stipulation shall also incorporate the agreement of plaintiffs that they will neither bring nor support any new litigation by whomever brought asserting any further environmental impact statements or actions under the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978 are required in connection with carrying out by the Project of its obligations under this Agreement.

16. Upon the occurrence of all of the events specified in Section 14, the Project shall pay attorneys' fees and costs as follows:

State of Nebraska	$60,000
Powder River Basin Resource Council and Laramie River Conservation Council	25,000

National Wildlife Federation,
Nebraska Wildlife Federation,
and National Audubon Society 50,000

17. This Agreement shall be executed in fourteen counterparts, numbered consecutively 1 through 14, each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

(Signed)

Basin Electric Power Cooperative
Tri-State Generation and Transmission Association, Inc.
City of Lincoln
Wyoming Municipal Power Ageney
The State of Nebraska (Governor and Attorney General)
The National Wildlife Federation, Inc.
The Nebraska Wildlife Federation
National Audubon Society, Inc.
Powder River Basin Resource Council
Laramie River Conservation Council
Deputy Assistant Attorney General*
Land and Natural Resources Division
Department of Justice
Administrator, Rural Electrification Administration*
District Engineer, Omaha District*
U.S. Army Corps of Engineers

*The Justice Department, the Rural Electrification Administration and the Corps of Engineers have no involvement in Sections 11 and 16 of this Agreement.

[EXHIBITS OMITTED]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 78-1775

State of Nebraska, et al.,)
Appellees,)
v.)
Basin Electric Power)
Cooperative, Inc., et al.,) Appeals from the
Appellants.) United States District
Court for the District
No. 78-1778 of Nebraska

State of Nebraska, et al.,)
Appellees,)
v.)
Rural Electrification)
Administration et al.,)
Appellants.)

Filed: February 27, 1979

Before GIBSON, Chief Judge, HEANEY and STEPHENSON, Circuit Judges.

ORDER

This cause having come before the court on a "Joint Motion Filed on Behalf of All Parties for an Order Dismissing Appeals, Vacating the Judgment Below, and Remanding the Cases to the District Court with Instructions to Dismiss With Prejudice," and the court having fully considered that motion, the accompanying Stipulation and Joint Memorandum of Law, and the entire record herein, it is

ORDERED that the amended judgment of the district

court below which was entered on October 23, 1978, and docketed on October 24, 1978, is hereby vacated;

FURTHER ORDERED that these consolidated appeals are hereby dismissed;

FURTHER ORDERED that these cases are hereby remanded to the district court with instruction to dismiss the cases with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978, which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

FURTHER ORDERED that, except as specifically provided in the Agreement of Settlement and Compromise, each party is to bear its own costs incurred in this litigation. Mandate will issue forthwith.

A true copy.

Attest: (Signed)
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al., Plaintiffs,	)	
vs.	)	ORDER OF
RURAL ELECTRIFICATION ADMINISTRATION, et al.	)	DISMISSAL
Defendants.	)	CV76-L-242

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed)
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al., Plaintiffs,	)	
vs.	)	ORDER OF DISMISSAL
JAMES W. RAY, et al., Defendants.	)	CV78-L-90

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed) _____
Chief Judge

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE	)	19-460
	)	OBJECTION TO
CORN CREEK	)	PETITION FOR
	)	FORMATION OF
IRRIGATION DISTRICT.	)	IRRIGATION DISTRICT

COMES NOW the State of Nebraska, by and through Paul L. Douglas, Attorney General of the State of Nebraska, by the authority vested in his office under Neb.Rev.Stat. §84-207 (Reissue 1976), and objects to the petition filed herein for reason that said petition and accompanying preliminary engineering report fail to fairly and reasonably establish the feasibility of the district and the sufficiency of the proposed water supply. In support of this objection the objector respectfully represents to the court as follows:

I.

That the State of Nebraska files this objection under the provisions of section 41-279 *Wyo. Stats.* (1957), as a person who may be affected by the formation of the Corn Creek Irrigation District since the waters proposed to be appropriated and used by the district are waters which normally flow from the Laramie River into the North Platte River and are eventually used by Nebraska citizens for agricultural, industrial and domestic purposes. These Laramie River flows, by contributing to the total flow of the North Platte River in Nebraska, are also necessary to maintain the quality of the environment in the North Platte and Platte River Basins in Nebraska.

II.

That the petitioner states that it has a contract for

storage of 22,500 acre-feet of water with Basin Electric Power Cooperative, which water is to be stored in the proposed Greyrocks Reservoir which is to be located on the Laramie River in Wyoming.

III.

That before Greyrocks Reservoir can be constructed, Section 404 of the Federal Water Pollution Control Act (33 U.S.C. §1344, as amended) requires the issuance of a permit by the United States Army Corps of Engineers. Thus far, Basin Electric Power Cooperative, as project manager, has failed to obtain this permit from the Corps. Without said permit the reservoir cannot be constructed and without the reservoir Basin Electric Power Cooperative cannot deliver 22,5000 acre-feet of storage water to the district.

IV.

That the State of Nebraska has filed a complaint in the United States District Court for the District of Nebraska (State of *Nebraska v. Rural Electrification Administration, et al.*, CV-76-L-242), a copy of which is attached hereto and incorporated herein. Basin Electric Power Cooperative, as project manager, has been permitted to intervene as a party defendant in that proceeding which is scheduled for trial in October, 1978. Also attached hereto and incorporated herein is an affidavit of James L. Grahl, which was filed in support of the motion of Basin Electric Power Cooperative to intervene in those proceedings. The objectors respectfully request the court to consider the statement in paragraph 8 of that affidavit. The statement in paragraph 8 shows that construction of Greyrocks Reservoir and Power Plant depends upon Rural Electrification Administration guaranteed financing. Pendency and final resolution of that action could jeopardize project financing and construction, and accordingly, the ability of Basin Electric Power Coopera-

tive to deliver 22,500 acre-feet of water to the petitioners herein.

V.

That the State of Nebraska has been and is currently negotiating with Basin Electric Power Cooperative concerning the construction and operation of the proposed Greyrocks Reservoir. The State of Nebraska has offered to withdraw its litigation and objections to the issuance of the 404 Permit if Basin Electric Power Cooperative guarantees to release certain amount of water from the reservoir which will flow into the North Platte River and into Nebraska for uses within Nebraska. The State of Nebraska believes that guaranteed releases from the reservoir will protect rights and established uses of Nebraska citizens to those flows in addition to those rights to the contributions of water the Laramie River makes to the North Platte River which accrue to the State of Nebraska under the United States Supreme Court decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), as modified June 15, 1953. Furthermore we also seek, through an agreement on guaranteed releases, to alleviate our concern that the water consumed in generating electricity by the project may have detrimental effects upon the environment and economy of the State of Nebraska. The objector believes that there is not enough water available in the Laramie River, including all water proposed to be impounded in Greyrocks Reservoir, to meet the total requirements of the State of Nebraska, the project and the proposed irrigation district.

VI.

That because of the foregoing the State of Nebraska submits that there are serious doubts about the reliability, sufficiency and future status of the district's proposed water supply.

WHEREFORE, the objector prays that the court dismiss said petition at the cost of the petitioner. In the alternative the objector prays this court enter an order continuing this matter until Basin Electric Power Cooperative has received its Section 404 Permit from the Corps of Engineers and until the issues in *Nebraska v. Rural Electrification Association, et al.*, have been resolved, or until such other time or contingency as the court may deem proper.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torryington, [sic] Wyoming 82240

STATE OF NEBRASKA)
) ss. VERIFICATION
COUNTY OF LANCASTER)

Paul L. Douglas, being first duly sworn deposes and says that he is the duly elected and acting Attorney General of the State of Nebraska, that he is one of the attorneys for the objector in the above entitled cause, that he has read the above and foregoing Objection and knows the contents thereof and that the allegations of fact in said Objection are true as he verily believes.

(Signed)
Paul L. Douglas, Attorney General
Subscribed and sworn to before me this 29th day of December, 1977.
(Signed)
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Objection to Petition for Formation of Irrigation District upon Mr. Bob C. Sigler, 2020 East "D" Street, Torrington, Wyoming 28840, on this 29th day of December, 1977, by mailing said copy through the United States Mail, with first class postage prepaid.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska

(Signed)
Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torrington, Wyoming

(Excerpts from Order)

STATE OF WYOMING	)	IN THE DISTRICT COURT
	)SS	EIGHTH JUDICIAL
COUNTY OF GOSHEN	)	DISTRICT
		Docket No. 19-460
In The Matter Of The	)	
	)	
CORN CREEK	)	
IRRIGATION DISTRICT	)	

ORDER

The Petition for the formation of the Corn Creek Irrigation District having come on for hearing on the 5th and 6th days of January, 1978, the petitioners appearing by and through their attorneys Stanley K. Hathaway, Bob C. Sigler and Dan J. Pauli; the contestants Wallace and Dorothy Newton and A.J. Bar Ranch Inc., appearing by and through their attorney Frank J. Jones; the State of Nebraska appearing by and through Steven C. Smith, Assistant Attorney General, State of Nebraska and Gerald Connolly; and the contestants, Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle, (being the purported purchasers of land from Gurny and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Wallace Newton (as to his separate petition to exclude lands not presently included in the boundaries of the proposed district), Kenneth R. Pursley, Dale Bremer, Miriam Bremer, Ralph Bremer, Lenore Bremer, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeanette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross appearing through Bruce A. Jagger and Gerald Connolly; and Bruce A. Jagger also

representing himself as trustee and personally as a contestant; and the Court having examined the files herein and having heard all the testimony and the arguments of counsel and being fully advised in the premises:

THE COURT DOTH FIND that the Petition filed herein for the formation of the Corn Creek Irrigation District is sufficient and that it is signed by a sufficient number of parties and that due and timely notice of this hearing has been given as required by law and by Order of this Court, and that the Court has jurisdiction in this matter.

THE COURT DOTH FURTHER FIND that the Corn Creek Irrigation District as proposed is feasible and that the report of the engineer accompanying said Petition is sufficient and the approval of the State Engineer is adequate and that an Order should be entered for the formation of said District.

THE COURT DOTH FURTHER FIND, as to the protest filed by the State of Nebraska, that the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the proposed District, and therefore, the State of Nebraska has no grounds for objection to the creation of said District and that its protest should therefore be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Petition for the formation of the Corn Creek Irrigation District filed herein be, and the same is hereby, in all things ratified, approved and confirmed.

2. That the Corn Creek Irrigation District, with the boundaries hereinafter fixed and determined, be, and the same is hereby organized and established as a corporation by the name of the "CORN CREEK IRRIGATION DISTRICT" with all powers and rights granted to such corporations pursuant to Wyoming law.

3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that this finding, Order and Decree shall be final and conclusive upon all parties in interest unless appealed from to the Wyoming Supreme Court within thirty days after the same is filed in the office of the Clerk of this Court.

DONE IN OPEN COURT.

(Signed)
Judge

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT IN AND FOR GOSHEN COUNTY, WYOMING

STATE OF WYOMING, ex rel., GEORGE L. CHRISTOPULOS, WYOMING STATE ENGINEER, Plaintiff, vs. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, and DONALD PAUL HODEL, SECRETARY OF THE INTERIOR; C. DALE DUVALL, COMMISSIONER OF RECLAMATION; BILL E. MARTIN, REGIONAL DIRECTOR, MISSOURI BASIN REGION, U.S. BUREAU OF RECLAMATION; DAVID G. WILDE, PROJECT MANAGER, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; KENNETH C. RANDOLPH, CHIEF, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; WILLIAM McCRACKEN, HYDROLOGIC TECHNICIAN, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION, in their official capacities, Defendants.	Docket No. 23-13 Filed October 3, 1986 (Signed) Clerk of District Court, Goshen Co.

COMPLAINT

COMES NOW the State of Wyoming by and through its attorney, A.G. McClintock, Attorney General, and in support of this complaint against Defendants alleges:

1. This action is brought pursuant to W.S. 41-2-111 upon request of the State Engineer to bring a suit to enjoin the unlawful diversion, storage and use of the waters of the State.

2. This court has jurisdiction over this matter pursuant to W.S. 41-2-111, Article 5, Section 10 of the Wyoming Constitution and W.S. 1-37-101 et seq. (1977). In particular, W.S. 41-2-111 empowers the district court to enjoin the unlawful appropriation, diversion or use of waters of the State. A showing of injury in a suit brought pursuant to W.S. 41-2-111 is not required as a condition to the issuance of any temporary restraining order, preliminary or permanent injunction.

3. This District Court has jurisdiction over the Defendants pursuant to the McCarren Amendment, 43 U.S.C. § 666. That Act provides in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by

> reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided That no judgment for costs shall be entered against the United States in any such suit.

4. Venue in the District Court of Goshen County, Wyoming is proper since the illegal diversion complained of herein occurs at Whalen Diversion Dam, on the North Platte River in Goshen County, Wyoming.

5. Defendant Donald Paul Hodel is Secretary of the Interior and, pursuant to 43 U.S.C. § 373, is charged by Congress with the duty of carrying out the provisions of the Reclamation Act of 1902, as amended, 43 U.S.C. § 371 et seq.

6. Defendant C. Dale Duvall is Commissioner of Reclamation and, pursuant to 43 U.S.C. § 373a, is charged by Congress with administration of the Reclamation Act of 1902, as amended, 43 U.S.C. §§ 371 et seq.

7. Defendant Bill E. Martin is the Regional Director for the Missouri Basin Region, U.S. Bureau of Reclamation (Bureau) which region includes the part of the North Platte River drainage that is relevant to this suit.

8. Defendants David G. Wilde, Project Manager, Kenneth C. Randolph, Chief of Land and Water Operations, and William McCracken, Hydrologic Technician, are employees of the U.S. Bureau of Reclamation in the North Platte River Projects Office in Mills, Wyoming and are responsible for the Bureau operations and facilities relevant to this action.

9. The Defendant United States owns and, through the

remaining Defendants, controls the diversion structures, conveyance systems and storage facilities in the "North Platte Project" along with the other storage facilities on the North Platte River in Wyoming where the unlawful acts occur and are therefore necessary parties to this suit.

10. The "North Platte Project" consists of reservoirs, structures and a system of canals and ditches that convey and distribute waters of the North Platte River to lands in Wyoming and Nebraska as part of a federal reclamation project. Defendants' Pathfinder Reservoir, Guernsey Reservoir, Whalen Diversion Dam, the Interstate Canal and four off-channel reservoirs (hereinafter referred to as the Inland Lakes) located in Nebraska and supplied by the Interstate Canal are the relevant component parts of the "North Platte Project."

11. The "North Platte Project" was planned, constructed and is to be operated in accordance with the provisions of an Act of Congress known as the Reclamation Act of 1902 as amended. 32 Stat. 388. Section 8 of that Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and

> beneficial use shall be the [redacted], the measure, and the limit of the right.

Id. at 390 (See 43 U.S.C. §§372, 383).

12. The North Platte River in Wyoming from which the unlawful diversions complained of herein are made is subject to administration according to Wyoming law and the terms and conditions of the Supreme Court's Order and Decree entered in *Nebraska v. Wyoming*, 325 U.S. 665, 66 S.Ct. 1, 89 L.Ed.2d 1857 (1945). Neither the Supreme Court's decree or its opinion in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815, (1945) relieved the Defendants from the duty of complying with the provisions of Wyoming law in order to appropriate, divert or use the waters of the North Platte River in Wyoming.

13. Article 8 Section 1 of the Wyoming Constitution provides that the water of all natural streams, springs, lakes or other collections of still water within the boundaries of the State are property of the Plaintiff, State of Wyoming.

14. Article 8 Section 3 of the Wyoming Constitution provides that priority of appropriation for beneficial uses shall give the better right.

15. Article 8 Section 5 of the Wyoming Constitution empowers the State Engineer to supervise the distribution of the waters of the State.

16. Pursuant to W.S. 41-4-501, any person, association or corporation intending to beneficially use the public water of the State must apply for and obtain a permit before doing so.

17. Pursuant to W.S. 41-3-301 et seq. (1977), any person, corporation, association or organization, of any nature

whatsoever, intending to divert water for beneficial use through storage must first apply for and obtain a permit before doing so.

18. Any person, association or corporation intending to store water in an off-stream reservoir is required to apply for and obtain a permit for the diversion of water through the reservoir supply canals to the reservoir and for the reservoir itself. W.S. 41-3-301 et seq. and W.S. 41-4-501 et seq. (1977).

19. Defendants are "persons" as defined by W.S. 8-1-102(a)(vi) and used in W.S. 41-4-301 et seq. and 41-3-501 et seq. and are subject to the provisions of Wyoming law.

20. Before Wyoming's waters can be appropriated, stored or diverted within this State for use outside of the State, compliance with the provisions of W.S. 41-3-115 (1977) is required.

21. Pursuant to Wyoming law, Defendants have secured adjudicated water rights for the "North Platte Project" for storage of water in Pathfinder Reservoir and Guernsey Reservoir. This water is allocated for irrigation of lands in Wyoming and Nebraska served through the Interstate Canal.

22. Defendants have not applied for or secured a permit to divert the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes pursuant to Wyoming law. There is no other means of acquiring the right to divert Wyoming water for that purpose than through those provisions of Wyoming law set forth above. *Lewis v. Board of Control*, 699 P.2d 822 (Wyo. 1986).

23. Defendants have been diverting, are now diverting, and intend to [illegible] natural flow of the

North Platte River at Whalen Diversion Dam, Goshen County, Wyoming through the Interstate Canal for storage in the Inland Lakes.

24. Defendant's diversion of the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes is unlawful and therefore must cease.

25. Additionally, Defendants have in the past, are now and intend to continue diverting, accumulating and storing the natural flow of the North Platte River in their reservoirs in Wyoming for the benefit of the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs contrary to Wyoming law.

26. Defendants have neither applied for nor secured the necessary permits pursuant to Wyoming law to divert, accumulate and store water for the benefit of Inland Lakes in the manner described above in allegation 25. W.S. 41-3-301 et seq. and 41-4-501 et seq.

27. Defendants' accumulation and storage of natural flow waters in their Wyoming reservoirs, in the manner described above in allegation 25 for the benefit of Inland Lakes is unlawful and therefore must cease.

WHEREFORE, Plaintiff prays:

1. That this Court declare that Defendants have no rights to divert the natural flows of the North Platte River in Wyoming in any manner for storage in the Inland Lakes until they acquire such a right in the manner prescribed by Wyoming law.

2. That this Court permanently enjoin Defendants,

their agents, employees, and representatives from diverting natural flows of the North Platte River in Wyoming through the Interstate Canal for storage in the Inland Lakes or in any manner diverting, accumulating and storing water within their Wyoming reservoirs on the North Platte River for the benefit of storage in the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs until the Defendants have complied with the laws of the State of Wyoming.

3. That this Court grant such other relief as it may deem necessary, just and proper.

Respectfully submitted this 3rd day of October, 1986.

(Signed)
A.G. McClintock
Attorney General
Jennifer Hager
Assistant Attorney General
Dennis C. Cook
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

PLAINTIFF'S ATTORNEYS

State of Wyoming)
) ss
County of Laramie)

George L. Christopulos, being duly sworn, deposes and says: he is the State Engineer for the State of Wyoming, the above named Plaintiff; he has read the foregoing complaint and the same is true to the best of his knowledge and belief.

(Signed)
George L. Christopulos

Subscribed and sworn to before me this 3rd day of October, 1986.

(Signed)
Notary Public